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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM HORTON,

Petitioner,

vs.

MILLER CHEMICAL COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Seventh Circuit Court of Appeals, in reversing a jury verdict for Petitioner and ordering judgment n.o.v. for Respondent, violate the clear mandates of the Seventh Amendment, the *Erie* Doctrine and the innumerable cases of this Court enunciating clear prohibition of *de novo* factual review.

a. Does not the appellate opinion below represent yet another in a series of cases, based upon review of recently published appellate opinions, that are subjecting jury factual findings to *de novo* review and thus necessitating this Court's exercising its paramount supervisory authority so as to reaffirm the permissible bounds of appellate examination of jury findings, thereby promoting the impartial administration of justice?

b. Do not the particular circumstances of this case disclose not only patent reweighing of facts and reassessment of witness credibility on the single ultimate factual question at issue but, additionally, a clear manifestation of intent to impose additional elements of proof not previously enunciated by any Illinois Court, all in clear violation of the *Erie* Doctrine, thereby requiring this Court to exercise its supervisory power to promote conformity of federal courts in Illinois with that state's law and insuring all Illinois' citizens their right to remedy?

c. Do not the particular circumstances of this case present this Court with the opportunity to clearly enunciate the application of a single federal standard to govern judicial determination of motions for directed verdict or judgment n.o.v., thereby promoting uniformity of procedure in the federal system?

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In The

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WILLIAM HORTON,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The decision of the court of appeals is reported at 776 F.2d 1351 (7th Cir. 1985), and is set out in the Appendix at A1-A18. The order denying rehearing is set out at A19. There was no district court opinion and judgment of the district court is in the Appendix at A35.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1985. A timely petition for rehearing was filed, which was denied on November 27, 1985 (A19). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The U.S. Constitution, Seventh Amendment, provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law.

28 U.S.C. § 2072, provides with regard to the Fed. R. Civ. P.:

> Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Fed. R. Civ. P., Rule 38 provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

Petitioner, William Horton, commenced this action in February, 1983, in the Circuit Court for the Tenth Judicial Circuit, Peoria County, Illinois. The action was on a claim of retaliatory discharge against his former employer, Miller Chemical Company.

The Defendant removed the action to the District Court for the Central District of Illinois under 28 U.S.C. §§ 1332, 1441(b) and 1446.

On June 25, 1984, the trial was commenced and the jury returned its verdicts on June 26, 1984. The jury returned a verdict in favor of the Plaintiff and against the Defendant and awarded Plaintiff compensatory damages in the amount of $73,825 and $100,000 in punitive damages. Judgment was entered on June 26, 1984, for Plaintiff in those amounts.

On October 22, 1984, the District Court denied Defendant's post-trial motions for judgment notwithstanding the verdict or to alter and amend the judgment and, alternatively, seeking a new trial (A36).

The vast majority of the facts giving rise to the Petitioner's claim were undisputed.

Petitioner asserted a retaliatory discharge because his employer, after being put on notice that the Petitioner had injured his back and should refrain from lifting for a seven (7) day period of time, discharged him within twenty-four hours of receipt of that information. Plaintiff was discharged after he had initiated treatment with a chiropractor and had presented the authorization for absence, from the chiropractor, to his employer. At the

time of discharge, Petitioner was told by his employer that he was a bad risk.

Petitioner was hired on January 16, 1978, as a truck driver/delivery man; Petitioner advised the local manager for Respondent that he had had some intermittent back pain since 1955. Petitioner has never suffered more than chronic back pain.

Petitioner completed the tenth grade of high school education and thereafter worked in various labor jobs. He did factory work and drove a truck until 1946, then went into the United States Army. Upon return from the army, he went to work for Caterpillar Tractor Company, and thereafter, farming. After farming, he began work as a welder and did that until he left the Peoria area to live in Wisconsin. He remained in Wisconsin for a few years and then returned to the Peoria area in 1977. It was at that juncture that Petitioner was asked to come to work for the Respondent as a driver/delivery man. At the time of his initial interview with Respondent, the Petitioner advised his prospective employer (the Respondent herein) that he would attempt to do the work, although he might experience some back problem.

Initially, Petitioner experienced some back difficulties which resulted in quitting his job. He began work on January 16, 1978, and quit on February 10, 1978. He did, however, return to work on February 10, 1978, though subsequently quitting and returning again during the latter portion of the month of February of 1978. He testified that he was having some complaints with his back and that the equipment he was using was causing him some difficulty.

Petitioner was rehired several times thereafter, and was finally reinstated in August of 1978. Between August of

1978 and April of 1981, Petitioner was only off work twice. One of those occasions, the latter, was by reason of an accident arising out of and in the course of his employment where he was "temporarily totally disabled" from March 28, 1980 to June 1, 1980. His temporary disability resulted in a workers' compensation settlement. He was not represented by counsel at that time.

Petitioner further testified that in 1980, he had considered and applied for employment at the Westinghouse Airbrake Company (WABCO) in Pecria, Illinois. He did not take the job at the request of Mr. Lawrence Hoffman, Respondent's managing officer.

On Friday, April 24, 1981, Petitioner suffered a low back strain by reason of an accident arising out of his employment. Upon return to the Peoria office, Petitioner reported the incident to Richard Dunham, office manager for Respondent. Petitioner advised Mr. Dunham at that time that he had injured his back and he was going to see his doctor. Mr. Dunham told him to go ahead. On the following Monday morning, Petitioner went to see a chiropractor, Dr. Grogg, who examined him and gave him an adjustment to his back. The chiropractor also gave Plaintiff a slip to take to his employer which was entitled "Authorization for Absence" and this slip stated "This is to certify that Bill Horton is under my care. In order to avoid aggravation of his/her condition, I recommend that he/she be excused from 4/27/81 until 5/4/81." There were also remarks concerning right L5 disc protrusion—no lifting and signed by the doctor.

On April 27, 1981, Mr. Dunham contacted Mr. Hoffman, Respondent's chief executive officer in Omaha, and advised him of the authorization for absence slip. Mr. Hoffman stated that prior to that point in time, he had not

personally viewed Mr. Horton's personnel file, nor was he aware of the history of Mr. Horton's back problems dating back to the date of his employment. Mr. Hoffman did state that Mr. Dunham made him aware of Petitioner's history at the time of the telephone conference on April 27, 1981.

Mr. Dunham testified, however, that prior to April 27 or 28, 1981, he had no knowledge of the personnel records of Mr. Horton and had not viewed the personnel file. Mr. Dunham further testified that he read the authorization for absence slip to Mr. Hoffman while they were on the phone together. Mr. Dunham further testified that Mr. Hoffman asked him how long the restriction was to last and Mr. Dunham had indicated that at the time of that telephone conference with Mr. Hoffman, he did not know how long the work restriction would last. He also testified that the word "permanently" was not on the restriction given to him by Mr. Horton.

Mr. Horton testified that on April 28, 1981, he returned to the Miller Chemical Co., offices and was thereupon advised by Mr. Dunham that he had talked with Mr. Larry Hoffman in Omaha. Mr. Dunham stated to the Petitioner that he was sorry, but "we will have to terminate you. You're a bad risk. We can't keep you on this employment."

The Petitioner subsequently pursued a workers' compensation claim under the Illinois statutory scheme and, after litigation, the matter was settled by a lump sum settlement contract. The lump sum settlement contract, in evidence, established that Petitioner was temporarily disabled from April 24, 1981 to June 26, 1981, a period of nine weeks.

Trial was commenced on June 25, 1984, and concluded with the jury returning a verdict on June 26, 1984, and awarding Plaintiff compensatory damages of $73,824, and $100,000 in punitive damages.

The district court was presented with a lengthy post-trial motion which included therein a motion for judgment n.o.v. All post-trial motions were denied by the district court.

Upon appeal, the Seventh Circuit reversed outright Petitioner's unanimous jury verdict on the ground that "Plaintiff had failed to set forth sufficient facts from which a jury could reasonably infer, given all the evidence presented at trial, the Defendant's motive in discharging him was to deter him from exercising, or to interfere with the exercise of, his rights under the (Workers' Compensation) Act. Thus, the Defendant was entitled to a judgment n.o.v."

The Seventh Circuit acknowledged that the Plaintiff had presented some evidence that the Defendant discharged him because he thought the Plaintiff was a bad risk for exercising his rights under the Act, but went on to indicate that, in their opinion, the evidence only showed that perhaps the Plaintiff had been unjustly treated because the Defendant had "erroneously decided that the Plaintiff was permanently disabled". The jury, however, had been instructed specifically that if they had found that the Plaintiff was discharged because of his physical inability to perform the duties of his employment, rather than for having pursued the rights and remedies afforded to him under the Illinois Workers' Compensation Act, they should then find for the Defendant.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE, A PECULIARLY STATE COMMON LAW TORT ACTION PRESENTING A JURY VERDICT FOR PLAINTIFF THAT WAS REVERSED BY THE COURT OF APPEALS DECISION ORDERING A JUDGMENT N.O.V. FOR DEFENDANT, IS REPRESENTATIVE OF A CONTINUING PATTERN OF FEDERAL APPELLATE DECISIONS WHICH ARE ROUTINELY REVERSING JURY VERDICTS ON THE BASIS OF REWEIGHING OF EVIDENCE AND REASSESSMENT OF THE CREDIBILITY OF WITNESSES; SUCH ACTION IS IN DIRECT CONTRADICTION OF THE MANDATES EXPRESSED IN THE SEVENTH AMENDMENT TO THE CONSTITUTION, THE "*ERIE*" DOCTRINE AND THE RICH HISTORICAL PRECEDENT GOVERNING REVIEW OF DISPUTED FACTUAL ISSUES WHICH JURIES ARE ASKED TO ADDRESS.

This Court's rich history as the special guardian of constitutional rights of the members of society is replete with the principle that factual issues are the particular province of a jury's determination and should not be subject to *de novo* appellate review which proceeds from reweighing of facts and reassessing witness credibility.

An insidious process of which neither this Court, nor in large part, the members of society are aware is presently under way which violates that very standard—in clear contradiction to the Seventh Amendment, the "*Erie*" Doctrine,[1] § 2072 of the Judicial Code, and the Fed. R. Civ. P. Rule 38(a).

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[1] *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, and all of its progeny.

If the data referenced to herein[2] permits the conclusion that there is a recognizable percentage of cases where the factual issues are being given *de novo* review with the concomitant result of verdict reversal, this Court must express to all of the federal circuits that the determination of factual issues at the trial court level are to be given the greatest of weight at the review stage and that a reweighing of evidence and reassessment of witness credibility, to permit the finding of a result different from that which the jury reached, is a particularly inappropriate intellectual process which directly contravenes both the express wording of, and meaning for, the standard enunciated in the Seventh Amendment to the United States Constitution.

Petitioner acknowledges that there may be perceived herein a case involving only a factual dispute—an isolated example which would not fit into the "type" of case with which this Court should have to concern itself. Such perceptions are inappropriate in light of all of the circumstances surrounding this case.

It is beyond peradventure true that there exists an overriding federal principle which mandates the high judicial respect which must be accorded to a jury's determination of disputed facts. The Seventh Amendment unequivocally expresses this mandate in terms neither convoluted, nor ambiguous.

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[2] Express reference is made herein to the data accumulated in a cause presently before this Court and captioned *Christine A. Craft, Petitioner v. Metromedia, Inc., Respondent,* No. 85-1053, on Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The data was attached in an appendix, at pages A107 through A128, to that Petition. Express permission for reference to that data was granted to counsel for this Petitioner by Mr. Dennis E. Egan, Esquire. That data is expressly incorporated herein by reference.

The mandate expressed in the Amendment must be viewed in its historical perspective: The procedures at common law, as they existed at the time of our national inception, are those which are said to specifically govern the application of judicial review of factual issues tried and submitted to a jury when a court is asked to determine, as a matter of law, whether there existed enough evidence to make an issue for the jury.[3]

As this Court has so succinctly stated in the past:

> It is not the function of a Court to search a record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inferences or conclusions drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions which it considers the most reasonable. (Citations). That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable. (*Tenant v. Peoria and P.U. Ry. Co.*, 321 U.S. 409, 412, 321 U.S. 29, 35).

That the fact finding process through jury deliberations has historically been accorded the highest degree of solem-

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[3] Rule 50(b), Fed. R. Civ. P.; 9 Wright & Miller, *Federal Practice and Procedure*: Civil § 2522; *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 55 S.Ct. 890 (1935).

nity is without question. Whether, in fact, that process is presently being abused is a question of the greatest importance for all people living within the broad expanses of this nation's borders.

The appellate opinion in this case presents another example of a process that is presently ongoing and can only be defined as an unconstitutional exercise of *de novo* appellate review of issues that are within the particular province of the jury in a civil trial setting.

A recent study[4] concluded that in all of the opinions issued by the federal appellate courts between October 1, 1984 and October 1, 1985, 233 cases involved challenges to the correctness of the jury's verdict. Of that figure, fully 105 appellate decisions resulted in reversal of the verdict, in whole or in part.

The study further points out that in nearly all of the 105 reversals, the district court had sustained the verdict which the appellate court reversed.[5]

Of greatest significance was the determination that the reversal rate, where verdicts were in favor of Plaintiffs and where commercial cases were excluded, was 57.9 percent: The probability of this occurring by chance was less than 1 in 10,000. In a legal system that, generally, demands proof of causation in civil cases by a standard of "more probably true than not true", the only conclusion that can be reached upon examination of the appeals as outlined in the study must be that those results occur by

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[4] See footnote 2, *supra*.

[5] The same process transpired here: more so, when it is recognized that the jury was specifically directed to find for Respondent if they believed Respondent's theory of medical inability and for any other reason other than their finding that Petitioner's discharge was a retaliatory act.

reason of some conscious intent to juxtapose *de novo* appellate re-examination of jury verdicts.

The founders of this nation, those who framed our constitutional government and fought for its birth, brought to this system a paramount distrust of the tyranny that absolute power may create. The circuit courts of appeals represent, as a practical matter, the courts of last resort for many litigants who seek judicial scrutiny of and redress for wrongs incurred within the daily give and take of life in our society.

The absolute duty imposed upon the judiciary by the Seventh Amendment, reaffirmed in § 2072 of the Judicial Code, as well as Rule 38(a) of the Fed. R. Civ. P., clearly and unequivocally expresses that very fear of which the framers of our nation's constitutional government thought most passionately about.

> The founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary. (*Parklane Hosiery v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 657, 658, Rehnquist, J. dissenting.)

In the case of *Anderson v. City of Bessemer City, N.C.*, ____ U.S. ____, 105 S.Ct. 1504 (1985), this Court reaffirmed and clearly enunciated the meticulous standard by which a district court's findings of fact, sitting without a jury, may be evaluated at the appellate level. The same principles apply to judicial review of any fact findings—whether by court or jury.

The jury's seemingly inviolate function as fact finder is presently being eroded. Petitioner submits that this case

presents yet another example of that process.[6] There is no doubt that:

> Where there are two permissible views of the evidence, the fact finders choice between them cannot be clearly erroneous. (*United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949).)

The purpose for such absolute prohibitions to appellate pronouncements is to ensure that those who are "permanently attached to the sovereign"[7] may not—and should not—interfere with a resolution by the finder of fact even though the "sovereign" may find the result either disadvantageous or politically unacceptable. Nearly fifty years ago in a case involving the second clause of the Seventh Amendment, Justice Sutherland eloquently bespoke this Court's important duty of construing and upholding the Constitution. (See: *Dimick v. Schiedt*, 295 U.S. at 485, 55 S.Ct. at 300).

By the very nature of the national scope of this Court's attention, many cases must be declined which can only be perceived to involve factual disputes between the parties to the litigation.[8] Yet, the very exigencies which compel this Court to decline many such cases creates a danger that those who sit in a position to represent the voice of the sovereign as a court of last resort may undertake to permit their own personal objections to become superimposed upon the decision of the finder of fact. Such a practice is ongoing even now. Without a clear pronounce-

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[6] The appellate opinion in this case was issued more than one month after the date upon which the study was concluded; see footnote 2, *supra*.

[7] *Parklane Hosiery v. Shore*, 439 U.S. 322, 99 S.Ct. 645, at 663, Rehnquist, J. dissenting.

[8] *Wilkerson v. McCarthy*, 60 S.Ct. 413, 419, Frankfurter, J. concurring.

ment by this Court, the inalienable right of the individuals in our nation to be free to have a jury pronounce the ultimate factual resolution to a dispute is in grave danger of becoming a mere phrase to which lip service will be accorded without any substantive merit. This Court's unique constitutional stewardship provides the impetus for certiorari in this particular matter.

II.

THE PARTICULAR CIRCUMSTANCES OF THIS CASE—NEARLY ALL EVIDENTIARY FACTS BEING UNDISPUTED, WITH THE SINGLE ULTIMATE ISSUE OF FACT BEING DETERMINED THROUGH INFERENCE AND THE EVALUATION OF WITNESS CREDIBILITY—PRESENTS THE PRECISE ISSUE WHICH IS CONTEMPLATED SHOULD BE DETERMINED BY A JURY WITHOUT FEAR OF *DE NOVO* APPELLATE REVIEW.

The brevity of the trial record in this case permits an examination of the exact evidentiary facts which became the focus of the appellate court's opinion below. An examination of the facts clearly discloses that the Seventh Circuit Court of Appeals undertook a patent reweighing of evidence and reassessment of witness credibility to reach a determination of the ultimate factual dispute which was contrary to that enunciated by the jury. Such a process is clearly violative of the very mandates expressed by this Court. (*Mercer v. Theriot*, 377 U.S. 152, 156 (1964), *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444 (1959)). The appellate opinion hereinbelow expressly acknowledges the existence of evidence by which a jury could conclude as it did in the district court; yet then proceeds to violate not only the very pronouncements of this Court, but the standard for reviewing a motion for

judgment n.o.v. as set forth by the State of Illinois—the standard by which it believed itself to be governed.[9]

A brief recitation of the legal principles of the tort of retaliatory discharge, as that tort has been enunciated by the Illinois Supreme Court, is necessary for a complete understanding of the gross error committed by the Seventh Circuit Court of Appeals. The tort of retaliatory discharge was first enunciated in Illinois in the seminal decision of *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1979). It was therein declared:

> We are not convinced that an employer's otherwise absolute power to terminate an employee-at-will should prevail when that power is exercised to prevent the employee from asserting his statutory rights under the Workmens' Compensation Act. As we have noted, the legislature enacted the Workmens' Compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening the discharge of employees seeking compensation under the Act. (74 Ill.2d at 181, 182)

Shortly thereafter, in *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876 (1981), the elements for a cause of action for retaliatory discharge were clearly defined.

> All that is required is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy. 85 Ill.2d 124 at 134.

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[9] Cf. Pts. III, IV, *infra*. Whether the proper standard was applied, Petitioner suggests it would make no effective difference—under any standard, the Seventh Circuit engaged in a reassessment of credibility of witnesses and patent reweighing of evidence.

In all subsequent decisions, these elements of proof have been reaffirmed.[10]

In this case, the court of appeals concluded its evaluation by stating:

> It is possible that the Plaintiff may have been discharged without just cause, but in Illinois an employer is not liable in tort for discharging an at will employee because it *erroneously believes* that the employee is permanently disabled. (Emphasis added)

The adverbial qualification "erroneously believes" goes to the very heart of the issue presented to this Court. The question of whether or not the Respondent erroneously believed the Petitioner was permanently disabled or whether the Respondent discharged the Petitioner for pursuing those rights afforded to him under the Illinois statutory scheme was the very question the jury was asked to answer.

To fully appreciate the appellate court's unlawful reevaluation process, it is necessary to point out that certain critical *facts*—which were presented to the jury—are conspicuous by their absence within the confines of the appellate court's opinion. These facts are uncontradicted in the record—only the meaning of or inferences to be drawn therefrom remained at dispute. These facts are, in part:

> a. Within twenty-four hours of presenting the Respondent with a medical authorization for absence, the Petitioner was fired and told, at that time, that he was being fired because he was a bad risk;
>
> b. Respondent admitted that an employee, who was a good employee, could have become sick and

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[10] Cf. *Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 473 N.E.2d 1280 (1985); *Darnell v. Impact Industries*, 105 Ill.2d 158, 473 N.E.2d 935 (1985).

have been off of work indefinitely without fear of losing his job;

c. The Petitioner had one week's vacation time coming at the time of his discharge, yet no one, admittedly, suggested he take his vacation in lieu of discharging him.

The court of appeals noted, as supportive of its reasoning process: "In addition, Hoffman and Dunham testified *consistently with one another that they understood* the doctor's note to mean that Plaintiff could do no more lifting, that he could therefore not perform his job and that, as a result, he had to be discharged." (776 F.2d at 1358). The appeals court failed to point out that both Messrs. Hoffman and Dunham were officers and managers of Respondent's company, and Dunham was impeached at trial.

The intellectual dishonesty is more pervasive, however, when it is recognized that the "doctor's slip" was the only piece of medical evidence awardable to Respondent at the time of Petitioner's discharge. The slip itself is a very damaging piece of evidence that was presented at trial—and again, conspicuous by absence in the appellate court opinion. Despite the appellate opinions interpretation to the contrary, it was *not* ambiguous in scope at all (cf. 776 F.2d at 1356). See also A37.

The Respondent claimed, at trial, that it believed Petitioner permanently disabled and had to let him go. Yet, it is uncontradicted by their own testimony, that the word permanently was never present on the slip.

The appellate opinion recites that the district court held that the evidence of "bad risk" was very ambiguous.

The appeals court concluded that the Respondent had erroneously believed the Petitioner permanently disabled, and, within twenty-four hours, in good faith, reasoned that he could no longer medically be a viable employee.

This was the very argument proffered to the district court by the Respondent. At the time of its motion for directed verdict, the following colloquy took place between Respondent and the district court:

> THE COURT: My understanding of the Workmen's Compensation Act is that one of the things that [is] specifically addressed there is the availability of medical attention.
>
> MR. CASSIDY: What is in this record that anybody retaliated for seeking medical attention other than that he followed his doctor's orders? As a matter of fact, "retaliation" means some affirmative act on the part of the employer. This was his choice, not our choice.
>
> THE COURT: There is a slight difference between suggesting that he be off a week and suggesting that he be off permanently. Let me say this: It seems to me that as to the question of whether or not he was discharged because he sought medical care pursuant to the provision of the Workers' Compensation Act or that he was discharged because of his inability to perform the work, that's a question; although it is a close, I think [it] [sic] is a question of fact for the jury. . . . (Tr. 140-414).

The strongest piece of evidence that can be presented to this Court to clearly establish the breadth of the court of appeals' error is that the jury, at the trial stage, was asked to address the very question (and thus, make the very inference) that the Respondent advanced to both the district court in its motions and the appeals court in its appeal: This was the very argument that was *accepted* by the appellate court as the proper factual inference to be drawn from all of the evidence. At the request of Respondent's counsel, the following instruction was given to the jury:

> The Plaintiff in this case was an at will employee and the Defendant had the right to discharge him for any reason other than for having pursued the rights and remedies afforded to him under the Illinois Workers' Compensation Act. *If you find that the Plaintiff was discharged because of physical inability to perform the duties of his employment rather than for having pursued the rights and remedies afforded to him under the Illinois Workers' Compensation Act, then your verdict should be for the Defendant.*" (Transcript of hearing, page 24) (Emphasis added)

Even more glaring is the appellate error when it is observed that the jury was expressly required, on causation, to find that "but for Plaintiff's conduct of pursuing his rights under the 'Act', he would not have been discharged".[11]

The issue, the question to be ultimately determined by the jury, was a relatively simple one—what was the intendment of the Respondent at the time of Petitioner's discharge. Petitioner acknowledges that reasonable men may differ as to what intent may be inferred from any given set of surrounding facts and circumstances. Yet, the jury in this case was given full opportunity to hear the evidence and observe the witnesses. In its opinion, the appellate court observed:

> The Plaintiff therefore presented some, albeit minimal, evidence that the Defendant discharged him because he thought the Plaintiff was a "bad risk" for exercising his rights under the Act. (776 F.2d at 1357).

Thus, the court of appeals acknowledged such an interpretation may be found in the evidence—yet they proceeded to reweigh the evidence and reassess the credibility of certain witnesses to arrive at a conclusion that the

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[11] Transcript of hearing, page 241.

jury expressly rejected. As this Court has so eloquently stated in the past:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. (*Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, at 744 (1946))

The particulars of this case present a clear picture of an appellate court which has violated the basic precepts of appellate review of jury findings by usurping the right constitutionally given to juries to weigh the evidence. The trial court's jury instructions virtually *commanded* the jury to find for the Respondent if any reasonable inference could be made that the Petitioner was discharged for his perceived medical inability to work and not just because of the pursuit of his statutory rights.[12] The appellate court's resolution of this case is so clearly at odds with the mandates which are set forth to govern that review, this Court should issue certiorari.

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[12] In this particular case, the jury was out less than 90 minutes. A clear statement of rejection of all of the inferences that the Respondent requested them to make, and which the appeals court accepted.

III.

THIS CASE IS REPRESENTATIVE OF A LINE OF DECISIONS BY THE FEDERAL APPEALS COURT CONSTRUING THE ILLINOIS COMMON LAW TORT OF RETALIATORY DISCHARGE IN A FASHION THAT RESULTS IN DEPRIVATION OF A LITIGANT'S RIGHT TO REMEDY FOR THAT TORT IN THE FEDERAL SYSTEM, ALL IN CLEAR VIOLATION OF THE *ERIE* DOCTRINE.

The Illinois Tort of Retaliatory Discharge was first enunciated by the Illinois Supreme Court in the case of *Kelsay v. Motorola, Inc., supra,* wherein it was stated:

> We are not convinced that an employer's otherwise absolute power to terminate an employee-at-will should prevail when that power is exercised to prevent the employee from asserting his statutory rights under the Workmens' Compensation Act. As we have noted, the legislature enacted the Workmens' Compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening the discharge of employees seeking compensation under the Act. (74 Ill.2d at 181, 182)

Subsequently, in *Palmateer v. International Harvester Co., supra,* a case concerning the discharge of an employee because he had assisted local authorities in criminal prosecution of a co-employee, the elements of the cause of action were clearly and distinctly enunciated. These elements have been, consistently, reiterated without substantive change.

> . . . [I]n *Palmateer v. International Harvester Co.,* (1981) 85 Ill.2d 124, an employee was terminated for informing police of suspected criminal activities of his co-workers. In holding that the tort of retaliatory discharge was applicable, we stated:

> The foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses . . .
>
> All that is required (to bring a cause of action) is that the employer discharge the employee in retaliation for the employees activities, and that the discharge be in contravention of a clearly mandated public policy. 85 Ill.2d 124, 133-134. (*Midgett v. Sackett-Chicago, Inc.*, (1984) 105 Ill.2d 143, 148)

The *Midgett* case, *supra*, takes on added significance because it represents a second time that the Seventh Circuit Court of Appeals was indirectly reversed by the Illinois Supreme Court in construing this particular Illinois common law tort.

On two occasions prior to the present case, the Seventh Circuit had ruled in this particular area. The first case, *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977), resulted in a determination by the Seventh Circuit that, if Illinois were to address the question, it would declare that no cause of action existed for the tort of retaliatory discharge. In December of 1978, the Illinois Supreme Court specifically stated: ". . . [W]e believe that the construction adopted on *Loucks* contravenes a public policy of this state." (*Kelsay v. Motorola, supra*, at 182).

The Seventh Circuit again addressed the scope of the tort of retaliatory discharge and, again, interpreted its breadth very narrowly: it held that employees under collective bargaining agreements have no right to a separate action for retaliatory discharge. (*Lamb v. Briggs Mfg.*, 700 F.2d 1092 (7th Cir. 1983)). In 1984, the Illinois Supreme Court pronounced, in direct response to, among other decisions, the *Lamb* case:

> ". . . We consider, however, that in order to provide a complete remedy, it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective-bargaining agreement. In *Kelsay*, an essential factor in providing the action for retaliatory discharge was a recognition of the importance of permitting the allowance of punitive damages against the offending employer.
>
> . . . Applying this reasoning here, there is no reason to afford a tort remedy to at-will-employees, but to limit union members to contractual remedies under their collective-bargaining agreements . . . (citation) . . . If there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no available sanction against the violator of an important public policy of this state . . . There is an important public interest in protecting the rights of workers under the Act, and in deterring unscrupulous employers from discharging employees. (*Midgett v. Sackett-Chicago, Inc.* (1985) 105 Ill.2d 143, 149, 150, 151)

The case herein is, again, an expression by the Seventh Circuit of a particularly restrictive interpretation of this cause of action—for though the appeals court must admit to the existence of the action, it attempts to enunciate new elements of proof and additional burdens that are placed upon a Plaintiff who brings the action. The articulation of such substantive rules of decision clearly and patently violates *Erie Railroad v. Tompkins*, *supra*, and all of its progeny, as enunciated by this Court.

The deleterious effect of this ruling upon pending actions or those which may arise in the future is self-evident: The appellate decision in this case will be highly persuasive to all courts of Illinois, and certainly, considered as precedent for all federal district courts sitting in that forum state.

Specifically, the appellate opinion in this case states:

> These Illinois' cases demonstrate that to show retaliatory discharge, the Plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights. (776 F.2d at 1356)

The opinion then, in holding, states:

> It is possible that the Plaintiff may have been discharged without just cause, but in Illinois, an employer is not liable in tort for discharging an at-will-employee because it erroneously believes that the employee is permanently disabled. Tort liability only attaches when the Plaintiff sets forth sufficient evidence of Defendant's illegal motive. In this case, that evidence was not presented[11]" (775 F.2d at 1359).

The most telling expression by the appeals court is found within the confines of "footnote 11", as follows:

> There is some hint in recent Illinois' cases that the burden of proof scheme set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should apply in the instant case. See *Darnell*, 105 Ill.2d at 162-163, 473 N.E.2d at 938 (Simon, J. concurring) (suggesting that directed verdict may be appropriate when the plaintiff presents a prima facie case, the defendant presents a legitimate non-discriminatory reason for discharge, and the plaintiff fails to rebut the non-discriminatory reason).
>
> In this case, the defendant presented a legitimate non-discriminatory reason and it would have been entitled to summary judgment, because the plaintiff simply failed to present sufficient evidence that the proffered reason was pretextual.

It can be clearly and unequivocally stated that only by the furthest stretch of imagination does the dissent by Justice Ryan, concurring in *Darnell v. Impact Industries*, 105 Ill.2d 158 (1985), state or imply adoption of the federal discriminatory scheme:

> Our opinion does not suggest, however, much less hold, that the Defendant could have not discharged the Plaintiff for dishonesty if it demonstrated, as it contends was the case, that she had lied on her application. The verdict was directed before the Defendant offered any evidence of its reason for discharging the Plaintiff. *What the reason for the discharge was is a question of fact to be determined by the finder of fact after the Defendant has presented its case.* (*Darnell v. Impact Industries*, (1984) 105 Ill.2d 158, 163, Justice Simon, concurring) (Emphasis added).

The court of appeals is thereby attempting to superimpose elements of federal discriminatory cases onto this state common law tort. It is the clear intent of the Seventh Circuit to require a Plaintiff to carry an additional element of proof as part of its burden—an element heretofore unknown in the Illinois courts. Thus, the appeals court clearly would violate the *Erie* Doctrine.

It is clear that the focal point of a retaliatory discharge claim is the act of termination of the employee. Whether or not the employee subsequently proceeds with those rights afforded to him under the stated public policy of the State of Illinois is irrelevant to a factual determination of whether or not the individual's firing was an act intended by the employer to, in some fashion, inhibit an employee from pursuing those rights and remedies.[13]

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[13] Even though Petitioner did enunciate to the jury what he perceived to be the violation, the clear inference of the appellate opinion that the subsequent pursuit of his remedy under the Workers' Compensation Act would seem to mitigate against any potential

(Footnote continued on following page)

Further, motive is not the issue: It is the intent of the employer at the time of the discharge that is the focus of the element of proof. There is a substantial difference between motive and intent that has long been recognized in the law.[14]

Under our dual system of government, federal courts are bound by state substantive law in diversity cases. In a federal diversity case, the court will apply state law, rather than fashioning rules of federal common law where application of state law involves no significant threat to an identifiable federal policy or interest (*Wallis v. Pan-American Petroleum Corp.*, 384 U.S. 63, 86 S.Ct. 1301 (1966)). In diversity cases, state court decisions control as to the requirements of a cause of action (*Transcontinental and Western Air, Inc. v. Koppal*, 345 U.S. 653, 73 S.Ct. 906 (1953)) as well as the availability and applicability of certain defenses (*Steele v. General Mills*, 329 U.S.

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[13] *continued*
harm from firing is contradictory to the purpose of an action for retaliatory discharge. Cf. 716 F.2d 1357, 1358, with *Midgett v. Sackett-Chicago, Inc.*, *supra*, at 151: ". . . there is an important public interest in protecting the rights of workers under the Act, and in deterring unscrupulous employers from discharging employees."; and, Ill. Rev. Stat. (1983), Chap. 48, Para. 138.4(h), which states in pertinent part: "It shall be unlawful for any employer, . . . to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights and remedies granted to him by this Act or to discriminate, attempt to discriminate or threaten to discriminate against an employee in any way because of his exercise of the rights and remedies granted to him by this Act.

It shall be unlawful for any employer, . . . to discharge or threaten to discharge . . . an employee because of the exercise of his rights and remedies granted to him by this Act."

[14] See: Prosser, *Law of Torts*, Fourth Edition, p. 31. Further, the appellate court's reliance on *Bryce v. Johnson & Johnson*, 115 Ill.App.3d 913, 450 N.E.2d 1235 (1st Dist. 1983) has been misplaced due to the fact that in that particular case, there was absolutely no evidence presented of a discharge of the "*Bryce*" Plaintiff.

433, 67 S.Ct. 439 (1947)). A question of whether or not given conduct is tortious is peculiarly one of state law (*Fashion Originators Guide v. Federal Trade Com.*, 312 U.S. 457, 61 S.Ct. 703 (1941)). The underlying substantive rule involved is based on state law and the state's highest court is the best authority on its own law (*Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776 (1967)).

It is clear that the appellate decision in this particular case enunciates elements of the decisional law which heretofore did not exist in Illinois. It places an additional burden of proof upon the Plaintiff and by reason of its precedential effect, presents a clear danger that, at least to the citizens of the State of Illinois, the tort of retaliatory discharge may no longer be considered a viable one within the federal system. As such, the decision by the appeals court herein clearly violates the *Erie* Doctrine and accordingly, certiorari should issue to rectify this glaring error.

IV.

THIS CASE PRESENTS THIS COURT WITH THE OPPORTUNITY TO DETERMINE THE ISSUE OF WHETHER OR NOT A REVIEW OF THE JURY'S VERDICT ON THE QUESTION OF A GRANTING OF A JUDGMENT N.O.V. SHOULD BE GOVERNED BY A SINGLE FEDERAL STANDARD OR MUST BE CONTROLLED BY APPLICATION OF STATE LAW WHERE JURISDICTION IS RESTED ON DIVERSITY OF CITIZENSHIP.

As has been noted previously by this Court:

> Lurking in this case is the question of whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement . . . (*Dick v. New York Life Insurance Co.* (1959) 359 U.S. 437, 444-445, 79 S.Ct. 921, 926).

In the case of *Mercer v. Theriot*, 377 U.S. 152, 84 S.Ct. 1157 (1964), this Court granted certiorari for the purpose of resolving the conflict among the circuits, but declined to enunciate a clear rule by reason of the fact that the court believed the evidence was sufficient under any standard that might be appropriate—state or federal (337 U.S. 152, at 156).

The conflict alluded to in the *Mercer, supra*, case still remains outstanding.[15]

The Seventh Circuit, upon review of the cases, appears to be one of the few circuits which hold that the standard for reviewing a verdict to determine whether or not a judgment n.o.v. should be granted is a state standard, though even within the Seventh Circuit, there has been a difference of opinion.[16]

The Illinois standard is set forth succinctly in the case of *Pedrick v. Peoria and Eastern Railroad Co.*, 37 Ill.2d 494, 510, 227 N.E.2d 504 (1967). The Seventh Circuit itself has stated that under the *Pedrick*, test, a directed verdict or j.n.o.v. should be granted only when "the evidence only supports one reasonable conclusion in Defendant's favor." *Oberman v. Dun & Bradstreet, Inc.*, 705 F.2d 349, 352 (7th Cir. 1974).

The cases suggesting a federal standard applies by reason that the determination of whether or not enough evidence existed to make an issue go to the jury is ultimately tied to the Seventh Amendment, state that a mo-

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[15] See: 5A Moore's *Federal Practice*, Para. 50.06, and the cases cited therein; and 9 Wright & Miller, *Federal Practice and Procedure*: Civil § 2524 and cases cited therein.

[16] Cf. *F. W. Hempel & Co., Inc. v. Metal World, Inc.*, 721 F.2d 610 (1983) with *Gudgel v. Southern Shippers, Inc.*, 387 F.2d 724 (1967).

tion for judgment n.o.v. should be denied if there is any substantial evidence supporting the verdict; the credibility of witnesses and weight of the evidence, proper consideration on a motion for new trial, are not the concern of the court on a motion for directed verdict or judgment n.o.v.; that the evidence must be viewed in the light most favorable to the party against whom the motion is made and the nonmovant must be given the benefit of all legitimate inferences that may be drawn in his favor; and the motion must be denied if so viewed that reasonable men might differ as to the conclusions of fact to be drawn.[17]

Certiorari should be granted in this case because it is an important consideration for all cases pending in all federal district courts nationally. A clear pronouncement needs to be made as to whether or not a federal standard applies and if so, what that standard is, when a court is asked to review a verdict in light of a trial court's denial of a motion for judgment n.o.v.

Petitioner submits that under any standard enunciated, whether it be a federal standard or the state standard that govern the Seventh Circuit's opinion in this case, reversal of the Seventh Circuit's opinion would be warranted.

However, should this Court believe that the state standard for review of a jury verdict in the question of granting or denying a motion for judgment n.o.v. is applicable, then this Court must conclude that the Seventh Circuit Court of Appeals violated the *Erie* Doctrine, for patently reweighing evidence and giving inferences to Respondent's evidence and against the Petitioner where they are bound to not re-evaluate a jury's determination of factual issues in that fashion.

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[17] See: footnote 15, *supra*.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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